/s/ Leon Jordan
UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT
PATRICIA L. McNUTT, CLERK

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:97-CV-738 (CR. 3-94-51)

[Filed February 22, 2001]

HAL EDWARD HODGES, Petitoner,	)
v.	)
UNITED STATES OF AMERICA, Respondent.	)

MEMORANDUM OPINION

Hal Edward Hodges ("Hodges") brings this motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. Hodges has filed two amended motions, and the United States has responded to all but the last amended motion. For the following reasons, the § 2255 motion will be DENIED and this case will be DISMISSED.

I. Background

Following a jury trial, Hodges was convicted of conspiracy to distribute marijuana and of money laundering. 21 U.S.C. § 846 and 18 U.S.C. §§ 1956(a)(1)(A)(i) and 2. A pre-sentence report (PSR) was subsequently prepared. The probation officer determined that Hodges had participated in a conspiracy involving 1181.17 kilograms of marijuana and

that his base level offense was 32.[1] The probation officer also determined that Hodges possessed a firearm during the offense, which increased his offense level by two levels, U.S.S.G. § 2.D1.1(b)(1), and that he was a leader or organizer of the conspiracy involving five or more participants, which warranted a four-level increase. The Court adopted the factual findings and guideline application in the PSR, but reduced the amount of marijuana to 627 kilograms (with a resulting base offense level of 28) and decreased the aggravating role adjustment to 3. Hodges was sentenced to serve a 168-month term of imprisonment and four years of supervised release. He was also ordered to pay a special assessment of $450.00. His conviction and sentence were affirmed on direct appeal.[2] He now brings this instant motion, alleging three claims for relief.

II. Standard of Review

In order to obtain relief under 28 U.S.C. § 2255 on the constitutional claims (grounds 1 & 3), the record must reflect an error of constitutional magnitude which had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson,* 507 U.S. 619, 737 (1993). To obtain relief on the basis of the non-constitutional claim

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[1] After grouping Hodges' conviction on the money laundering counts with his conviction on the marijuana conspiracy count, and determining that the offense level was higher on the conspiracy count, the guidelines sentence was calculated based on the conspiracy count. *See* U.S.S.G. § 3D1.3(a).

[2] Hodges only appealed his conviction for money laundering and his sentence for the drug conviction. *See United States v. Hodges,* 89 F.3d 836 (Table) 1996 WL 341158 (6th Cir. June 19, 1996, (unpublished disposition), *cert. denied,* 519 U.S. 886 (1996).

(ground 2), the record must reveal a fundamental defect in the proceedings that resulted in a complete miscarriage of justice or an error inconsistent with the rudimentary demands of fair procedure. *Reed v. Farley,* 512 U.S. 339, 348, 354 (1994); *Gall v. United States,* 21 F.3d 107, 109 (6th Cir. 1994).

III. Discussion

As grounds for relief, Hodges alleges:

1) that. bv being convicted under 18 U.S.C. § 1956(a)(2). he was denied his right to due process of law because he was charged with sending money orders under his own name to individuals in their own names and was not. therefore, tryinn to conceal or disguise the nature, the location, the source, the ownership or the-control of the proceeds of specified activity;

2) that the testimony of alleged co-conspirators should have been excluded because they were given valuable consideration for their testimony; and

3) that his sentence was improperly enhanced with sentencing factors not submitted to the jury but only submitted to the judge,

The Court will discuss each of these grounds individually.

Ground 1. In this ground, Hodges argues that his conviction under 18 U.S.C. § 1956(a)(2) works a denial of due process since the conduct with which he was charged in the indictment (i.e., with sending money orders under his own name to individuals under their own names) does not meet the terms of the conduct which is prohibited under that statute

(i.e.,concealing or disguising the proceeds of specified unlawful activity).[3] (Doc. No. 1, Motion at 5).

He also argues that he was actually convicted under 18 U.S.C. § 2 (the aiding and abetting statute), but that he had no notice that he would have to answer to an aiding and abetting charge under § 2 since what he took notice of and prepared to defend against was that he was being tried under Section 2 of

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[3] Title 18 of Section 1956 of the United States Code reads, in relevant part:

(a)(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States-

....

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part-

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;

....

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956.[4] (Doc. 4, Petitioner's Reply to the United States' Response to Section 2255 Petition).

First of all, notwithstanding Hodges' reference to "Section 2 of 18 U.S.C. § 1956, "there is no such statute in existence. There is, however, a subsection (a)(2) of 18 U.S.C. § 1956 (regarding transfers of funds to United States from a place outside the United States and of funds from the United States to a place outside the United States).[5] But, Hodges was not indicted or tried under this subsection and his jury was not instructed on the elements of an offense under this subsection. Section 1956 also contains a subsection (b)(2) which concerns the assessment of civil penalties for violation of (a)(1), (a)(2), or (a)(3), and a subsection (c)(2), which contains the statutory definition of the word "conducts," but Hodges was not charged with or convicted of violating these statutory provisions either.

Secondly, the judgment of conviction entered against Hodges does not reflect that he was convicted of violating either "18 U.S.C. § 1956(a)(2)" (as alleged in the motion) or

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[4] It is true that Hodges was convicted under 18 U.S.C. § 2, but it is also true that he was indicted under that statute. An indictment serves notice to a defendant as to the offense(s) of which he stands accused and against which he must defend

[5] The Government has responded to Hodges' contentions, i.e., that what he took notice of and prepared to defend against was that he was being tried under § 2 of 18 U.S.C. § 1956, as though he really meant § 1956(a)(2). Hodges is not proceeding *pro* se in this matter and the Court need only consider what he actually alleged in his motion and not what he meant to allege, if indeed, that could be ascertained. *See E/Zy v. United States,* 205 F.3d 882, 885 (6th Cir. 2000).

"Section 2 of 18 U.S.C. § 1956" (as alleged in Hodges' reply to the Government's response). Instead, the judgment order shows that Hodges was convicted of violating *Section* 1956(a)(1)(A)(i) and *Section* 2 of Title 18 of the United States Code.[6]

Therefore, since Hodges was neither convicted nor sentenced under 18 U.S.C. § 1956(a)(2) or the non-existing Section 2 of § 1956, his claim that his conviction under those statutes violated his right to due process may be summarily dismissed.

Moreover, it appears that Hodges' true claim is that the evidence was insufficient to convict. Clearly, Hodges would have known the offense(s) for which he was convicted when the jury verdict was read[7] and since the testimony, argument,

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[6] With regard to the money laundering conviction, the order reads:

"Accordingly; the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
...	...	...	...
18: 1956(a)(1)(A)(I) & 2	Money laundering	12/18/93	36, 41, 42, 43, 45, 74 77 & 79

(Doc. No. 465 in Hodge's Criminal Court File). Note that, in the order, section numbers of the statutes are not enclosed in parentheses (e.g., 1956 & 2), whereas the numbers of subsections are enclosed in parentheses (i.e.,1956(a)(1)(A)(i)).

[7] Attorneys for the defendant and for the Govemment are sent copies of judgment orders, signed by the district judge and entered

exhibits, and the rulings of the court and its instructions to the jury are clear on the face of the record, he could have asserted all claims, including this particular one, regarding evidentiary insufficiency at that time.[8] The failure to raise an issue at an earlier opportunity constitutes a waiver. *United States v. Welsh,* 733 F.2d 31, 34-35 (6th Cir. 1984). An issue that could have been but was not raised on direct appeal may not be reviewed under § 2255, unless the petitioner shows cause and actual prejudice sufficient to excuse his failure to do so. *United States v. Frady*, 456 U.S. 152, 167-69 (1982); Elzy v. *United* States, 205 F.3d 882, 884 (6th Cir. 2000); *Ratliff v. United States,* 999 F.2d 1023, 1025 (6th Cir. 1993).

In an apparent attempt to show cause, Hodges offers the explanation that neither he nor his attorney were aware of this ground at the time of trial or appeal because it was only recognized subsequently. In support of his position, he cites to *United States v. Herron,* 97 F.3d 234 (8th 1996) *cert. denied,* 519 U.S. 1133 (1997), an Eighth Circuit decision involving a money laundering conviction.

The *Herron* case, however, has no arguable relevance here because the money laundering conviction considered in *Herron* involved a conviction under § 1956(a)(1)LB. ~ (i) (the concealment or disguise prong of the statute), whereas Hodges' conviction for money laundering, as noted previously, was under a different subsection, i.e., § 1956(a)(1)(A)(i) (the intent to promote a drug business prong).

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in criminal cases.

[8] In fact, one of Hodges' four claims on appeal was a challenge to the sufficiency of the evidence to convict him of money laundering. *See Hodges, supra,* 1996 WL 341158, *'1, **2

Moreover, even if Hodges had been convicted under the concealment prong of § 1956, his argument with respect to subsequent recognition of his lack-of-concealment claim would not constitute cause. This is so because he cannot assert that he had no reasonable basis upon which to construct his ground, see *Reed v. Ross,* 468 U .S. 1, 15 (1984) (novelty of a claim may constitute cause where counsel has no reasonable basis upon which to reasonably formulate a constitutional question), since the facts upon which Hodges' claim is based were in existence--and, indeed, have remained unchanged--since the trial and because the legal basis for raising such a claim was available at the time of his appeal. *See Engle v. Isaac,* 456 U.S. 107, 134 (1982) (a claim is available where other defense counsel have perceived and litigated that claim). It was available because attorneys were then advancing such claims. *United States v. Rockelman,* 49 F.3d 418, 422 (8th Cir. 1995) (no concealment where defendant did not attempt to conceal his identity or the source of the funds with which he purchased real estate and placed title in the name of his business).

To the extent that Hodges is inferring that he had ineffective assistance of counsel in that his appellate attorney failed to recognize the factual or legal basis for this ground, this too does not amount to cause to excuse the waiver.[9] *See Murray v. Carder,* 477 U.S. 478, 486 (1986).

Thus, this ground has no basis in the record and, in any case, has been waived.

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[9] This § 2255 motion was filed by Hodges' attorney, Mr. Douglas A. Trant, who also represented Hodges at trial and on direct appeal

Ground 2 In this ground, Hodges asserts that the testimony of alleged co-conspirators should have been exclude(I because they were given valuable consideration for their testimony. As support for this proposition, he cites to *United States v. Singleton,* 144 F.3d 1343 (10th Cir.1998). In *Singleton,* the Tenth Circuit construed 28 U.S.C. § 201(c)(2), the anti-gratuity statute, as prohibiting the government from procuring testimony in return for something of value, including a promise of leniency or a more favorable plea agreement in exchange for a witness's testimony against a co-defendant.

This claim is foreclosed. First of all, the Tenth Circuit case upon which Hodges bases his argument was reversed on *en banc* review, albeit after Hodges filed the supplemental motion relying on the *Singleton* decision. *See United States v. Singleton*, 16.5 F.3d 1297, 1302 (10th Cir.) *(en banc), cert. denied,* 527 U.S. 1024 (1999). The second and more compelling reason why this ground is foreclosed is that the Sixth Circuit has rejected completely the holding and the underlying reasoning in the *Singleton* case. *United States v. Ware,* 161 F.3d 414, 428 (6th Cir. 1998), *cert. denied,* 526 U.S. 1045 (1999). This ground, thus, lacks medt.

Ground 3 Hodges predicates his final claim upon the authority of *Apprendi v. New Jersey,* 120 S.Ct. 2348 (2000), arguing that his sentence was improperly enhanced with sentencing factors not submitted to the jury but only submitted to the judge. (Doc. No. 9). He also cites to other cases applying *Apprendi.*

In *Apprendi,* the Supreme Court held that any fact, other than a prior conviction, that increases the prescribed range of penalties to which a criminal

defendant is exposed beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.

At the outset, the Court notes that Hodges has not fleshed out his claim by identifying the sentencing factors used to enhance his sentence which he is challenging as a violation of the *Apprendi* rule or by supplying any argument whatsoever. He, therefore, has inadequately presented his claim for this Court's review.

Be that as it may, the rule in *Apprendi* does not apply to sentences fixed below the prescribed statutory maximum sentence. *United States v. Munoz,* 233 F.3d 410, 414 (6th Cir. 2000); *United States v. Corrado,* 227 F.3d 528, 441-42 52 (6th Cir. 2000), or to sentencing guideline "enhancements below the prescribed statutory maximum sentence. *See Talbott v. Indiana,* 226 F.3d 866, 869-70 (7th Cir. 2000). In this case, Hodges faced a maximum sentencing penalty for money laundering under 18 U.S.C. § 1956(a)(1)(A)(i) of up to twenty (20) years. The Court sentenced him to a guidelines sentence of 168-months, less than the prescribed maximum statutory sentence of twenty years. Thus, since the Court's determination that certain sentencing factors applied did not result in a sentence in excess of the maximum statutory penalties for the money laundering offense for which Hodges was convicted,[10] and assuming without deciding whether the *Apprendi* holding applies retroactively to cases on collateral review, the *Apprendi*

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[10] As noted, Hodges' guidelines sentence was calculated on the basis of the marijuana conspiracy conviction because it was the more serious offense.

rule is not implicated here. *See Corrado, supra, (Apprendi* rule is not triggered because defendants were not sentenced beyond the 20-year statutory maximum prescribed for RICO offense); *c.f. United States v. Rebmann,* 226 F.3d 521 (6th Cir. 2000) *(Apprendi* rule applies where defendant was sentenced beyond the 20-year maximum penalty prescribed for § 841(a) drug offense when the sentencing judge determined that death resulted from drug distribution); *United States v. Nordby,* 225 F.3d 1053 (9th Cir. 2000) *(Apprendi* rule applies where finding regarding quantity of marijuana increased the statutory maximum penalty to which defendant exposed under the facts found by jury). Ground three affords Hodges no basis for relief.

IV. Conclusion

Accordingly, the motion pursuant to 28 U.S.C. § 2255, seeking to vacate, correct, or set aside sentence will be denied in its entirety. A petitioner is entitled to

a certificate of appealability "only if the applicant has made a substantial showing of the denial of a Constitutional right." 28 U.S.C. § 2253(c)(2). For the reasons stated above, Hodges has failed to demonstrate such a denial. Because there are no constitutional issues deserving of appellate review, a certificate of appealability shall not issue. Fed. R. App. P. 22(b).

A separate order will enter.

ENTER:

/s/ Leon Jordan
UNITED STATES DISTRICT JUDGE

APPENDIX C

MOTION UNDER 28 U.S.C. §2244 FOR ORDER AUTHORIZING DISTRICT COURT TO CONSIDER SECOND OR SUCCESSIVE APPLICATION FOR RELIEF UNDER 28 U.S.C. §2254 OR §2255

United States Court of Appeals for the Sixth Circuit

Name of Movant: Hal Edward Hodges

Prisoner No.: 14203-074

Case Number: (leave blank)

Place of Confinement: Federal Prison Camp, Ashland, KY

IN RE: HAL EDWARD HODGES , MOVANT

1. Name and location of court which entered the judgment of conviction from which relief is sought: United States District Court for the Eastern District at Knoxville

2. Parties' Names: United States of America vs. Hal Edward Hodges

3. Docket number: _____

4. Date of judgment of conviction: 03/15/95

5. Length of sentence: 168 months

6. Nature of offense(s) involved (all counts): conspiracy to distribute marijuana and money laundering

7. What was your plea? (Check one)
[x]Not Guilty [ ]Guilty [ ]Nolo Contendere

8. If you pleaded not guilty, what kind of trial did you have? (check one) [x]Jury[ ]Judge only

9. Did you testify at your trial? (check one) [ ]Yes [x]No

10. Did you appeal from the judgment of conviction (Check one) [x]Yes [ ]No

11. If you did appeal, what was the

Name of Court appealed to: United States Court of Appeals for the 6th Circuit at Cincinnati, OH

Parties' names on appeal: Hal Edward Hodges, Appellant vs. United States of America, Appellee

Docket number of appeal: 95-5403

Date of decision: 05/19/96

Result of appeal: Conviction affirmed

12. Other than a direct appeal from the judgment of conviction and sentence, have you filed any other petitions, application for relief, or other motions regarding this judgment in any federal court?
[x]Yes [ ]No

13. If you answered. "yes" to question 12, answer the following questions:

A. FIRST PETITION, APPLICATION, OR MOTION

(l) In what court did you file the petition, application, or motion? United States District Court, Eastern District at Knoxville

(2) What were the parties' names: Hal Edward Hedges vs. United States of America

(3) What was the docket number of the case? 3:97-CV-738

(4) What relief did you seek? vacate judgment

(5) What grounds for relief did you state in your petition, application or motion?: 1) that, by being convicted under 18 U.S.C. § 1956(a)(2), he was denied his right to due process of law because he was charged with sending money orders under his own name to individuals in their own names and was not, therefore, trying to conceal or disguise the nature, the location, the source , the ownership or the control of the proceeds of specified activity; 2) that the testimony of alleged co-conspirators should have been excluded because they were given valuable consideration for their testimony; and (3) that his sentence was improperly enhanced with sentencing factors not submitted to the jury but only submitted to the judge.

(6) Did the court hold an evidentiary hearing on your petition, application or motion? [ ]yes [x]No

(7) What was the result?

[ ] Relief granted a
[ ] Relief denied on the merits
[ ] Relief denied for failure to exhaust
[ ] Relief denied for procedural default
[ ] Relief denied as premature
[ ] Case transferred to court of Appeals request to file second/successive §2254/2255-application for relief

(8) Date of court's decision: 02/22/01

[NOTE: You must attach copies of all prior orders granting or denying relief under §2254 or §2255, even if you believe that you do not need this court's permission to file your current application]

B. SECOND PETITION, APPLICATION, OR MOTION

(1) In what court did you file the petition, application, or motion?

(2) What were the parties" names:

(3) What was the docket number of the case?

(4) What relief did you seek?

(5) What grounds fee relief did you state in your petition, application or motion?

(6) Did the court hold an evidentiary hearing on your petition, application or motion? [ ]Yes [ ]No

(7) What was the result?

[ ] Relief granted a
[ ] Relief denied on the merits
[ ] Relief denied for failure to exhaust
[ ] Relief denied for procedural default
[ ] Relief denied as premature
[ ] Case transferred to court of Appeals request to file second/successive §2254/2255-application for relief

(8) Date of court's decision:

[NOTE: You must attach copies of all prior orders granting or denying relief under §2254 or §2255, even if you believe that you do not need this court's permission to file your current application.]

C. THIRD AND SUBSEQUENT PETITIONS, APPLICATION, OR MOTIONS

For any third or subsequent petition, application, or motion, attach a separate page providing the information required in items (1) thorough (8) above for first and second petitions, applications, motions.

D. PRIOR APPELLATE REVIEW(S)

Did you appeal any order regarding your petitions, applications, or motions to a federal Court of appeals having jurisdiction over your case? If so, list the docket numbers .and dates of final disposition for all subsequent petitions, applications, or motions filed in a federal court of appeals.

First petition, application, or motion
[x] Yes Appeal No. 01-5287 Date 12/6/01 [ ] No
Second petition, application, or motion
[ ] Yes Appeal No. _____Date _____ [ ] No
Subsequent petitions, applications, or motions
[ ] Yes Appeal No. _____Date _____ [ ] No
Subsequent petitions, applications, or motions
[ ] Yes Appeal No. _____Date _____ [ ] No
Subsequent petitions, applications, or motions
[ ] Yes Appeal No. _____Date _____ [ ] No
Subsequent petitions, application or motions
[ ] Yes Appeal No. _____Date _____ [ ] No

If you did not appeal from the denial of relief on any of your prior petitions, applications, or motions, state which denials you did not appeal and explain why you did not.

_____

_____

14. Did you present any of the claims in this application in any previous petitions, applications, or motions for relief under 28 U.S.C. §2254 or §2255 (Check one)

[x]Yes [ ]No

15. If your answer to question 14 is "yes", give the docket number (s) and court(s) in which such claims were raised and state the basis on which relief was denied

docket 3:97-CV-738
District Court denied the *Appreadi v. New Jersey* claim by holding that the defendant was not sentenced beyond the 20 year statutory maximum and that *Apprendi* does not retroactively apply to cases on

collateral review. *Blakley* redefines statutory maximum (See Attachment)

16. If your answer to question 14 is "No", answer the following questions:

A. State the claims which you did not present in any previous petition, application, or motion for relief under 28 U.S.C. §2254 or §2255:_____

_____

B. State the reasons explaining why you did not present the above claims in any previous petition, application or motion for relief under 28 U.S.C. §2254 or §2255:_____

_____

*NOTE: This Court will grant you authority to file in the district court only if you show that you could not have presented your present claims in your previous §2254 or §2255 application because...

A. (For §2255 motions only) the claims involves "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found [you] guilty", or,

B. (For §2254 petitions only) "the factual predicate for the claim Could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no

reasonable factfinder would have found [you] guilty of the offense", or,

C. (For both §2254 end §2255 applicants) the claims involved "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court [of the United States], that was previously unavailable."

Movant prays that the United States Court of Appeals for the Sixth Circuit issue an Order Authorizing the District Court to Consider Movant's Second or Successive Application for Relief Under 28 U.S.C. §§ 2254

/s/ Hal Edward Hodges
Movant's Signature

I declare under Penalty of Perjury that my answers to all questions in this Motion are true and correct.

Executed on 9/16/04

/s/ Hal Edward Hodges
Movant Signature

PROOF OF SERVICE

A copy of this motion and all attachments mush be sent to the state attorney general (§2254 cases) or the United States Attorney for the United States judicial district in which you were convicted (§2255 cases).

I certify that on 09/21/2004 I mailed a copy of this motion and all attachments to:

H. Sandy Mattice, Jr. US Attorney at the following address:

H. Sandy Mattice, Jr. US Attorney
800 Market Street, Suite 21, Knoxville, TN 37902

/s/ Hal Edward Hodges
Movant Signature

There was no allegation in the original indictment against Ed Hodges of any particular amount of drugs nor any sentencing enhancement under the U.S.S.G. The only testimony presented at trial as to any actual amounts was only 304 lbs. There is a legitimate question as to any amount at all was proven to the jury beyond a reasonable doubt.

They never found beyond a reasonable doubt as to any other of the enhancements including firearm, role in the defense or obstruction of justice. The obstruction of justice evidence was not alleged nor presented at trial at all. In his first petition to Vacate his Judgment pursuant to 28 U.S.C. 2255, the Petitioner under Apprendi v. New Jersey. 530 U.S. 466 (2000), that the enhancements were never proven to a jury beyond a reasonable doubt. Blakely v. Washinton. 124 S. Ct. 1493 (Mem). 58 L.Ed 2d 75, shows that these enhancements are unconstitutional and in violation of the Petitioner's right to a jury trial under the Sixth Amendment to the United States Constitution. The Petitioner would also submit that they are in violation of the Fifth Amendment to the United States Constitution because the jury never considered these allegations, he was not given notice of the allegations and was denied due process. The Petitioner is not asking the court to invalidate the Sentencing guidelines. This Court has held in US v. Koch, No. 02-6278(6^{e} Circuit, August 26, 2004) that Blakely does not invalidate the sentencing guidelines. What the Petitioner is asking, is that he be sentenced by the guidelines, but **also in accordance with the Sixth Amendment.**

If he were so sentenced, his sentence would he 63-78 months (Level 26) if the 304 lbs of marijuana were found to have been presented to and proven to the jury beyond a reasonable doubt or 0 to 6 months if the 304 lbs was not properly alleged or properly proven to a jury beyond a

reasonable doubt. The Defendant would be subject to immediate release because he has served well beyond either sentence.

Blakelv should be applied retroactively. A fundamental nature that the right to a jury trial should be observed and is implicit in the concept of ordered liberty." Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed 2nd 334 (1989). The third alternative, the Petitioner Submits that Teague v. Lane should be revisited because what is determined to he constitutional today should have been constitution through out the history of our country particularly when discussing the Sixth Amendment right to a jury trial. The doctrine of non retroactivity is simply permitted to side step careful constitutional review of sentences with were previously unconstitutionally obtained. Scalia wrote in concurrents in James B. Beam Distilling Company v. Georoa. 501 U.S. 529, ll 1 S. Ct. 2439, 115 L, Ed. 2d 481 (1991):

> If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted.... That is the power "to say what the law is," *Marbury v. Madison,* 1 Cranch 137, 177, 2 L. Ed. 60 (1803), not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it,* which is to .say as *though they* were "finding" it-discerning what the law is, rather than decreeing what it m today changed *to,* or what it will tomorrow be."

As the Blackstone wrote in Book IV, Chapter 27, page 343:

"Our law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown... But the founders of the English laws have with excellent forecraft contrived,.., that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion"

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

UNITED STATES DISTRICT COURT

Name of Movant: Hal Edward Hodges
Prisoner No.: 14203-074
Place of Confinement: Federal Prison Camp, Ashland, KY
Case No.:

UNITED STATES OF AMERICA

v.
Hal Edward Hodges
(name under which convicted)

MOTION

1. Name and location of court which entered the judgment of conviction under attack: United States District Court for the Eastern District at Knoxville

2. Date of judgment of conviction: 03/15/95

3. Length of sentence: 168 months

4. Nature of offense involved (all counts): Conspiracy to distribute marijuana and money laundering

5. What was your plea? (Check one)
   (a) Not guilty [x]
   (b) Guilty [ ]
   (c) Nolo contendere [ ]

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury [x]
   (b) Judge only [ ]

7. Did you testify at trial?
   Yes[ ] No[x]

8. Did you appeal from the judgment of conviction?
   Yes [x] -No[ ]

9. If you did appeal, answer the following:

   (a) Name of court: Unites States Court of Appeals for the 6th Circuit
   (b) Result: Conviction affirmed
   (c) Date of result

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in my federal court?

    Yes[x] No[ ]

11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court: US District Court, Eastern District at Knoxville

    (2) Nature of proceeding: Vacate Judgment

(3) Grounds raised

(1) That by being convicted under 18 U.S.C. §1956(a)(2). he was denied his right to due process of law because he was charged with sending money orders under his own name to individuals in their own names and was not therefore, trying to conceal or disguise the nature the location, the source, the ownership or the control o f the proceeds of specified activity:

(2) that the testimony of alleged co-conspirators should have been excluded because they were given valuable consideration for their testimony: and

(3) that his sentence was improperly enhanced with sentencing factors not submitted to the jury but only submitted to the judge

(4) Did you receive an evidentiary hearing on your petition, application or
Yes[ ] No[x]

(5) Result Relief denied on the merits

(6) Date of result: 02/22/01

(b) As to any second petition, application or motion give the same information:

(1) Name of Court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes[ ] No[ ]

(5) Result _____

(6) Date of result _____

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes [x] No [ ]
(2) Second petition, etc. Yes [ ] No [ ]

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held in violation of the .constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relation to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(ĝ) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected or impaneled.

(i) Denial of effective assistance of counsel

(j) Denial of right of appeal.

A. Ground one: See attachment

Supporting FACTS (state *briefly without* citing cases or law) See attachment

13. If any of the grounds listed in 12 A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes[ ] No[x]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing:
(b) At arraignment and plea: Douglas A. Trant 900 S. Gav Street Suite 1502, Knoxville, TN 37902
(c) At trial: Douglas A. Trant, 900 S. Gay Street, Suite 1502, Knoxville, TN 37902
(d) At sentencing: Douglas A. Trant, 900 S. Gay Street, Suite 1502, Knoxville, TN 37902

(e) On appeal: Douglas A. Trant, 900 S. Gay Strut, Suite 1502, Knoxville, TN 37902

(f) In any pos-conviction proceeding: Douglas A. Trant, 900 S. Gay Street, Suite 1502, Knoxville, TN 37902

(g) On appeal from any adverse ruling in a post-conviction proceeding: 900 S. Gay Street, Suite 1502, Knoxville, TN 37902

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes[x] No[ ]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes[ ] No[x]

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes[ ] No[ ]

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

/s/ _____

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true end correct Executed on 9/16/04

/s/ Hal Edward Hodges
Signature of Movant

There was no allegation in the original indictment against Ed Hodges of any particular amount of drugs nor any sentencing enhancement under the U.S.S.G. The only testimony presented at trial as to any actual amounts was only 304 lbs. There is a legitimate question as to any amount at all was proven to the jury beyond a reasonable doubt.

They never found beyond a reasonable doubt as to any other of the enhancements including firearm, role in the defense or obstruction of justice. The obstruction of justice evidence was not alleged nor presented at trial at all. In his first petition to Vacate his Judgment pursuant to 28 U.S.C. 2255, the Petitioner under Apprendi v. New Jersey. 530 U.S, 466 (2000), that the enhancements were never proven to a jury beyond a reasonable doubt. Blakely v. Washington. 124S. Ct. 1493 (Mem). 158 L.Ed.2d 75, shows that these enhancements are unconstitutional end in violation of the Petitioner's right to a jury trial under the Sixth Amendment to the United States Constitution The Petitioner would also submit that they are in violation of the Fifth Amendment to the United States Constitution because the jury never considered these allegations, he was not given notice of the allegations end was denied due process. The Petitioner is not asking the Court to invalidate the sentencing guidelines. This court has held in US v. Kock No. 02-6278(6^{e} Circuit, August 26, 2004) that Blakely does' not invalidate the sentencing guidelines. What the Petitioner is asking, is that he sentenced by the guidelines, but aim in accordance with the Sixth Amendment.

If he were so sentenced, his sentence would he 63-78 months (1reel 26) if the 304 lbs of marijuana were found to have been presented to and proven to the jury beyond a reasonable doubt or 0 to 6 months if the 304 lbs was not properly alleged or properly proven to a jury beyond a

reasonable doubt. The Defendant would be subject to immediate release because he has served well beyond either sentence.

Blakelv should be applied retroactively. A fundamental nature that the right to a jury trial should be observed and is "implicit in the concept of ordered liberty." Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed2m 334 (1989). The third alternative, the Petitioner submits that Teague v. Lane should be revisited became what is determined to be constitutional today should have been constitution through out the history of our country particularly when discussing the Sixth Amendment right to a jury trial. The doctrine of nonretroactivity is simply permitted to side Step careful constitutional review of sentences with were previously unconstitutionally obtained. Scalia wrote in concurrents in James B. Beam Distilling Company v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, L. Ed. 2d48i (1991):

"If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the

> Constitution was enacted .... That is the power "to say what the law is," *Marbury v. Madison* 1 Cranch 137, 177, 2 L. Ed. 60 (1803), not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it,* which is to say as *though* they were "finding" it discerning what the law is, rather than decreeing what it is today changed *to,* or what it will tomorrow be."

As the Blackstone wrote in Book IV, Chapter 27, page 343:

"Our law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown... But the founders of the English laws have with excellent forecraft contrived,.., that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion. "

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

Name of Movant:	Hal Edward Hodges
District:	Eastern District of Tennessee
Place of Confinement:	FCI, Talladega
Prisoner No.:	14203-074

UNITED STATES OF AMERICA
v.

HAL EDWARD HODGES
(name under which convicted)

MOTION

1. Name and location of court which entered the judgment of conviction under attack: United States District Court for the Eastern District of Tennessee at Knoxville

2. Date of judgment of conviction: May 10, 1995

3. Length of sentence: 168 Months

4. Nature of offence involved (all counts): Conspiracy to distribute marijuana and money laundering

5. What was your plea? (Check one)
   (a) Not guilty [x]
   (b) Guilty [ ]
   (c) Nolo contendere [ ]

If you entered a guilty plea to one count of indictment, and a not guilty plea to another count or indictment, give details:

---

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury [x]
   (b) Judge only [ ]

7. Did you testify at the trial?
   Yes[ ] No[x]

8. Did you appeal from the judgment of conviction?
   Yes[x] No [ ]

9. If you did appeal, answer the following:

   (a) Name of court: United States Court of Appeals for the Sixth Circuit

   (b) Result: Conviction Affirmed

   (c) Date of result: June 19, 1996

   (d) Name of Court- United States Supreme Court

   (e) Result- Petition for Writ of Certiorari denied

   (f) Date of result- October 7, 1996

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
    Yes [ ] No [x]

11. If your answer to 10 was "yes" give the following information:

(a) (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [ ] No [ ]

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [ ] No [ ]

(5) Result _____

(6) Date of result _____

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition.

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

_____

_____

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground, If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds, if you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled

(i) Denial of effective assistance of counsel

(j) Denial fo right of appeal

A. Ground one: The petitioner was denied the due process of law

B. Ground two:

Supporting FACTS (state briefly without citing cases or law):

C. Ground three:

Supporting FACTS (state briefly without citing cases or law):

D. Ground four:

Supporting FACTS (state briefly without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them:

The ground raised above was not raised at trial or on appeal because it a ground that has been subsequently recognized subsequent to the trial of the Petitioner and was not known to the Petitioner nor his counsel at the time of trial. United States v. Herron, 97 F. 3d 234 (8th Cir. 1996) held that one could not be convicted of money laundering by concealment when financial transfers were made in the actual name of the persons sending and the person receiving the money transfers.

14. Do yo have any petition or appeal now pending in any court as to the judgment under attack?
Yes [ ] No [x]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: N/A

(b) At arraignment and plea: Jimmy Kyle Davis

(c) At trial: Jimmy Kyle Davis and Douglas A. Trant

(d) At sentencing: Jimmy Kyle Davis and Douglas A. Trant

(e) On appeal: Jimmy Kyle Davis and Douglas A. Trant

(f) In any post-conviction proceeding: Douglas A. Trant

(g) On appeal from any adverse ruling in a post-conviction proceeding:

16. Were you sentenced on more that none count of an indictment, or on more than one indictment, int the same court and at approximately the same time?
Yes [ ] No [ ]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes [ ] No [ ]

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

/s/ Douglas A. Trant, #6871

I declare under penalty of perjury that the foregoing is true and correct. Executed on 10/2/90

/s/ Hal Edward Hodges

APPENDIX D

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 04-6127

[Filed, March 7, 2005]

Hal Edward Hodges, Petitioner,	)
v.	)
United States, Respondent.	)

ADDENDUM TO MOTION UNDER 28 U.S.C. §2244 FOR ORDER AUTHORIZING DISTRICT COURT TO CONSIDER SECOND OR SUCCESSIVE APPLICATION FOR RELIEF UNDER 28 U.S.C. §2255

Comes the Petitioner, Hal Edward Hodges, by and through Counsel, Douglas A. Trant, to supplement his Motion by adding that the recent decision of the Sixth Circuit on Humphress v. United States, __ F 3d __ (6th Cir 2005), WL 433191, addressed the retroactivity of US v. Booker, Certiorari to the United States Court of Appeals for the Seventh Circuit, No 04-104, decided January 12, 2005, but in doing so only addressed the retroactivity of the Sixth

Amendment Jury Trial issue by relying on Schriro v. Summerlin 124 S. Ct. 25 19 (2004). That case does not address the due process concerns of the Justice Stevens and the majority in Booker became Schriro did not involve any due process issues in that the Judge found the aggravating circumstances beyond a reasonable doubt. The Defendant submits that under the due process holding of Booker, Booker should be applied retroactively because the due process issue can be considered either a substantive or a watershed procedural issue.

In addition, the Petitioner raised the Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) issue in his initial 2255 Petition. As Justice Stevens writes in Booker. they were merely following and clarifying their decision in Apprendi v. New Jersey. For that reason as well, the Petitioner should be allowed to proceed on this Petition.

Respectfully submitted,

DOUGLAS A. TRANT, #6871
900 S. Gay Street
Suite 1502
Knoxville, TN 37902
(865) 525-7980

Signed in other than black ink for security purposes

CERTIFICATE OF SERVICE

I hereby certify that I have mailed or delivered a true and exact copy of the foregoing document to Sandy Mattice, Jr., United States Attorney, 800 Market Street, Suite 211, Knoxville, TN 37902, on this the 3rd day of March, 2005.

/s/ Douglas Trant